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8 Attorneys for Defendant
9 DAVID S. BOYD

10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA -- OAKLAND DIVISION
12

13 In re:)	Case No. 12-46157 RLE
14 FRESH CHOICE, LLC, a Delaware)	
15 limited liability company)	Chapter 7
16 Debtor.)	
17 -----)	
18 -----)	Adv. No. 12-4241
19 JOHN KENDALL, Chapter 7 Trustee and)	
20 McNUTT LAW GROUP LLP,)	ANSWER OF DAVID S. BOYD
21 Administrative Claimant,)	
22 Plaintiffs,)	
23 vs.)	
24 DAVID S. BOYD,)	
25 Defendant.)	

26 Defendant David S. Boyd ("Defendant") responds to the Amended Motion for Order (1)
27 Subordinating the Claim Held by David S. Boyd and (2) Transferring the Lied Securing Such
28 Claim to the Estate (the "Complaint") filed by McNutt Law Group ("MLG") and John T. Kendall,
Chapter 7 Trustee (the "Trustee") as set forth below.

1. Responding to the allegations of Paragraph 1 of the Complaint, Defendant admits
the allegations, with the exception that Defendant disputes that MLG has standing to assert the

1 claims stated in the Complain, and as such the Court lacks subject matter jurisdiction to adjudicate
2 the claims as they relate to MLG.

3 2. Responding to the allegations of Paragraph 2 of the Complaint, Defendant admits
4 the allegations.

5 3. Responding to the allegations of Paragraph 1 of the Complaint, Defendant admits
6 the allegations.

7 4. Responding to the allegations of Paragraph 4 of the Complaint, Defendant admits
8 the allegations.

9 5. Responding to the allegations of Paragraph 5 of the Complaint, Defendant admits
10 the allegations.

11 6. Responding to the allegations of Paragraph 6 of the Complaint, Defendant admits
12 the allegations.

13 7. Responding to the allegations of Paragraph 7 of the Complaint, Defendant admits
14 that MLG was appointed as counsel to the Official Committee of Unsecured Creditors (the
15 “Committee”) and that MLG has asserted that it is an administrative expense claimant. Defendant
16 lacks sufficient information and belief regarding the remaining allegations of Paragraph 7 and on
17 such basis denies them.

18 8. Responding to the allegations of Paragraph 8 of the Complaint, Defendant admits
19 that the Defendant is the president and managing member of Fresh Choice, LLC (the “Debtor” or
20 “Fresh Choice”).

21 9. Responding to the allegations of Paragraph 9 of the Complaint, Defendant admits
22 the allegations.

1 10. Responding to the allegations of Paragraph 1 of the Complaint, Defendant admits
2 the allegations.

3 11. Responding to the allegations of Paragraph 11 of the Complaint, Defendant admits
4 that the Debtor intended to close certain locations. Defendant denies the remaining allegations of
5 Paragraph 11 on the basis that they are unintelligible and ambiguous.
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7 12. Responding to the allegations of Paragraph 12 of the Complaint, Defendant admits
8 the allegations.

9 13. Responding to the allegations of Paragraph 13 of the Complaint, Defendant admits
10 the allegations.
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12 14. Responding to the allegations of Paragraph 14 of the Complaint, Defendant denies
13 the allegations.

14 15. Responding to the allegations of Paragraph 15 of the Complaint, Defendant admits
15 that US Foods was a secured creditor of the Debtor, but lacks sufficient information and belief as
16 to the remaining allegations of Paragraph 15 and on such basis denies them.
17

18 16. Responding to the allegations of Paragraph 16 of the Complaint, Defendant lacks
19 sufficient information and belief to respond to the allegations and on such basis denies them.

20 17. Responding to the allegations of Paragraph 1 of the Complaint, Defendant denies
21 the allegations.

22 18. Responding to the allegations of Paragraph 18 of the Complaint, Defendant lacks
23 sufficient information and belief to respond to the allegations and on such basis denies them.
24

25 19. Responding to the allegations of Paragraph 19 of the Complaint, Defendant denies
26 the allegations.
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1 20. Responding to the allegations of Paragraph 20 of the Complaint, Defendant denies
2 the allegations, on the grounds that the phrase “turned over” is vague and ambiguous, and the
3 landlords were free to take possession of the premises in question upon the entry of the order
4 approving rejection of the leases in question.
5

6 21. Responding to the allegations of Paragraph 21 of the Complaint, Defendant denies
7 the allegations.

8 22. Responding to the allegations of Paragraph 22 of the Complaint, Defendant denies
9 the allegations.

10 23. Responding to the allegations of Paragraph 23 of the Complaint, Defendant admits
11 that the Debtor operated at a loss after the filing of the Debtor’s Chapter 11 petition.
12

13 24. Responding to the allegation of Paragraph 24 of the Complaint, Defendant admits
14 that administrative rent claims were accrued while the Debtor was in Chapter 11.

15 25. Responding to the allegations of Paragraph 25 of the Complaint, Defendant lacks
16 sufficient information and belief regarding US Foods’ motivation and on such basis denies the
17 allegations of Paragraph 25.
18

19 26. Responding to the allegations of Paragraph 26 of the Complaint, Defendant admits
20 that MLG coordinated and negotiated Defendants’ purchase of the claim of US Foods, but lacks
21 sufficient information and belief regarding the role of the Committee in such activities and on such
22 basis denies the remaining allegations of Paragraph 26.
23

24 27. Responding to the allegations of Paragraph 27 of the Complaint, Defendant lacks
25 sufficient information and belief regarding the motivation of the Committee and on such basis
26 denies the allegations of Paragraph 27.
27
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1 28. Responding to the allegations of Paragraph 28 of the Complaint, Defendant admits
2 the allegations.

3 29. Responding to the allegations of Paragraph 29 of the Complaint, Defendant denies
4 the allegations.

5 30. Responding to the allegations of Paragraph 30 of the Complaint, Defendant admits
6 the allegations.

7 31. Responding to the allegations of Paragraph 31 of the Complaint, Defendant admits
8 the allegations.

9 32. Responding to the allegations of Paragraph 32 of the Complaint, Defendant lacks
10 sufficient information and belief regarding the “awareness” of the Committee and on such basis
11 denies the allegations.

12 33. Responding to the allegations of Paragraph 33 of the Complaint, Defendant admits
13 that at a hearing on October 15, 2012 Michael Abel of MLG stated to the Court that Defendant
14 was in the process of purchasing US Foods’ claim and that a possible purchase of certain assets of
15 the Debtor by Mr. Boyd was under discussion.

16 34. Responding to the allegations of Paragraph 34 of the Complaint, Defendant denies
17 that there was ever any agreement reached regarding a purchase of any assets of the Debtor.
18 Defendant admits that there were discussions regarding a possible purchase of assets of the Debtor
19 which possible purchase might have included parties other than Defendant.

20 35. Responding to the allegations of Paragraph 35 of the Complaint, Defendant denies
21 the allegations as the allegations misstate was stated by counsel for the Committee at the hearing
22 on October 15, 2012.

1 36. Responding to the allegations of Paragraph 36 of the Complaint, Defendant admits
2 that the Debtor did not pay all rent obligations accruing on all of the Debtor's leases which
3 accrued after the purchase of US Foods' claim by Defendant.

4 37. Responding to the allegations of Paragraph 37 of the Complaint, Defendant denies
5 the allegations on the grounds that the allegations that the phrase "the Committee sought to
6 minimize concerns" is vague, ambiguous and unintelligible.

7 38. Responding to the allegations of Paragraph 38 of the Complaint, Defendant denies
8 the allegations in that Defendant continued to negotiate with MLG regarding a possible purchase
9 of certain of Debtor's assets following Defendant's purchase of US Foods' claims.

10 39. Responding to the allegations of Paragraph 39 of the Complaint, Defendant denies
11 the allegations in that Defendant had no idea what belief the Committee had regarding an
12 "acceptable offer."

13 40. Responding to the allegations of Paragraph 40 of the Complaint, Defendant admits
14 the allegations.

15 41. Responding to the allegations of Paragraph 41 of the Complaint, Defendant admits
16 that he submitted a written offer to purchase certain assets of the Debtor to counsel for the
17 Committee on Tuesday, November 6, 2012.

18 42. Responding to the allegations of Paragraph 42 of the Complaint, Defendant denies
19 that any purchase price was discussed "at the time the Committee worked with Boyd to acquire
20 US Foods claims" and on that basis denies the allegations of Paragraph 42.

21 43. Responding to the allegations of Paragraph 43 of the Complaint, Defendant denies
22 the allegations.

1 44. Responding to the allegations of Paragraph 44 of the Complaint, Defendant admits
2 the allegations.

3 45. Responding to the allegations of Paragraph 45 of the Complaint, Defendant admits
4 that the Trustee requested that Defendant guaranty any shortfall as a result of operations continued
5 operations from December 9, 2012 through December 13, 2012 and that the Trustee requested that
6 Defendant forward \$150,000 to the Trustee's counsel on Tuesday, December 13, 2012.

7 46. Responding to the allegations of Paragraph 46, Defendant admits that he offered to
8 forward \$150,000 to the Trustee's counsel as a guaranty against any shortfalls arising as a result of
9 operations from December 9, 2012 through December 13, 2012.
10

11 47. Responding to the allegations of Paragraph 47, Defendant admits that he did not
12 forward funds to the Trustee's counsel as against any shortfalls arising as a result of operations
13 from December 9, 2012 through December 13, 2012. Defendant further alleges that he continued
14 to agree to guaranty any such shortfalls and that no such shortfalls ever occurred.
15

16 48. Responding to the allegations of Paragraph 48, Defendant lacks information and
17 belief regarding any conference between the Trustee and Gerry Blake on November 12, 2012 and
18 on such basis denies the allegations of Paragraph 48.

19 49. Responding to the allegations of Paragraph 49, Defendant lacks information and
20 belief regarding any instructions by the Trustee to Gerry Blake on November 12, 2012 and on
21 such basis denies the allegations of Paragraph 49.
22

23 50. Responding to the allegations of Paragraph 50, Defendant denies the allegations.
24

25 51. Responding to the allegations of Paragraph 51, Defendant denies the allegations in
26 that Debtor did not operate any of Debtor's stores following conversion of Debtor's bankruptcy
27 case to Chapter 7 as the Debtor was no longer a debtor in possession.
28

1 52. Responding to the allegations of Paragraph 52, Defendant denies the allegations.

2 53. Responding to the allegations of Paragraph 53, Defendant admits that post-petition
3 rent was not paid during the period Debtor was a Chapter 11 debtor in possession on certain leases
4 for stores that operated during that period. Defendant denies negotiating with any landlord
5 regarding a new lease prior to rejection of such landlord's lease.
6

7 54. Responding to the allegations of Paragraph 54, Defendant denies that Debtor had
8 any "location" at the Vallco Mall on November 27 and 28 in that the lease for such location had
9 been rejected prior to that date and on that basis Defendant denies the allegations of Paragraph 54.
10

11 55. Responding to the allegations of Paragraph 55, Defendant admits that Espresso
12 Roma signed a lease for the location at the Vallco Mall.

13 56. Responding to the allegations of Paragraph 56, Defendant admits that Espresso
14 Roma used certain property located at the Vallco Mall which was property of the estate, which
15 was Defendant's collateral, and as to which the Trustee had already filed a motion to abandon,
16 without consent of the Trustee or an order of the Court. Defendant denies that the estate suffered
17 any harm as a result of such use.
18

19 57. Responding to the allegations of Paragraph 57, Defendant denies the allegations.

20 58. Responding to the allegations of Paragraph 58, Defendant admits that Espresso
21 Roma operated at the Vallco Mall on a cash only basis.

22 59. Responding to the allegations of Paragraph 59, Defendant admits that the property
23 used by Espresso Roma at the Vallco Mall location had not been abandoned at the time of such
24 use.
25

26 60. Responding to the allegations of Paragraph 60, Defendant admits the allegations.

27 61. Responding to the allegations of Paragraph 61, Defendant admits the allegations.
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1 62. Responding to the allegations of Paragraph 62, Defendant denies the allegations as
2 an order authorizing abandonment of the property has been entered.

3 63. Responding to the allegations of Paragraph 63, Defendant denies the allegations.

4 64. Responding to the allegations of Paragraph 64, Defendant lacks information and
5 belief regarding the claims of MLG and BEB and on such basis denies them.
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7 65. Responding to the allegations of Paragraph 65, Defendant denies the allegations.

8 66. Responding to the allegations of Paragraph 66, Defendant admits that his an insider
9 of the Debtor, but alleges that the degree of scrutiny to which his conduct is subject depends upon
10 the particular conduct in question.
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12 67. Responding to the allegations of Paragraph 67, Defendant admits that the relief
13 requested in the Complaint is not inconsistent with other provisions of the Bankruptcy Code.

14 **AFFIRMATIVE DEFENSES**

15 **First Affirmative Defense (Lack of Standing of McNutt Law Group)**

16 The McNutt Law Group lacks standing to bring the claim set for the in the Complaint in
17 that the Trustee has elected to bring such claim.
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19 **Second Affirmative Defense (Unclean Hands)**

20 The McNutt Law Group has unclean hands in that, among other things, it provided
21 Defendant with legal advice regarding the purchase of the US Foods claim and encouraged
22 Defendant to make such purchase in an effort to obtain a distribution to the McNutt Law Group in
23 excess of what it would otherwise have been entitled to receive on a pro-rata basis with other
24 administrative claimants had a sale of assets been consummated.
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26 WHEREFORE, Defendant prays that the Court:
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1. Enter judgment in favor of Defendant David S. Boyd denying plaintiffs request
that Defendant's claim be subordinated; and,

2. Granting such other relief as the Court deems just and appropriate.

Dated: December 20, 2012

MANASIAN & ROUGEAU, LLP

By: /s/ ***Paul E. Manasian***
Attorneys for Creditor DAVID S. BOYD